

September 20, 2021

VIA ELECTRONIC SUBMISSION
European Securities and Markets Authority
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Re: CCP12 responses to ESMA’s seven Consultation Papers on CCP Recovery and Resolution Regime (CCPRRR)

I. Introductory remarks

The Global Association of Central Counterparties (“CCP12”) appreciates the opportunity to comment on the European Securities Markets Authority’s (“ESMA”) Consultation Papers on

- Draft RTS on the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources (Article 9(15) of CCPRRR)¹ – Page [2](#)
- Draft RTS specifying the conditions for recompense (Article 20(2) of CCPRRR)² – Page [7](#)
- Draft Guidelines further specifying the circumstances for temporary restrictions in the case of a significant non-default event in accordance with Article 45a of EMIR³ – Page [10](#)
- Draft Guidelines on the consistent application of the triggers for the use of Early Intervention Measures (Article 18(8) CCPRRR)⁴ – Page [12](#)
- Draft Guidelines on CCP recovery plan indicators (Article 9(5) CCPRRR)⁵ – Page [17](#)
- Draft Guidelines on CCP recovery plan scenarios (Article 9(12) CCPRRR)⁶ – Page [20](#)
- Draft RTS further specifying the factors that shall be considered by the competent authority and the supervisory college when assessing the CCP recovery plan (Article 10(12) CCPRRR)⁷ – Page [23](#)

¹ ESMA, Consultation Paper, Draft RTS on the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources (Article 9(15) of CCPRRR) (Jul. 2021), available at [Link](#).

² ESMA, Consultation Paper, Draft RTS specifying the conditions for recompense (Article 20(2) of CCPRRR) (Jul. 2021), available at [Link](#).

³ ESMA, 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 (Jul. 2021), available at [Link](#).

⁴ ESMA, Consultation Paper, Draft Guidelines on the consistent application of the triggers for the use of Early Intervention Measures (Article 18(8) CCPRRR) (Jul. 2021), available at [Link](#).

⁵ ESMA, Consultation Paper, Draft Guidelines on CCP recovery plan indicators (Article 9(5) CCPRRR) (Jul. 2021), available at [Link](#).

⁶ ESMA, Consultation Paper, Draft Guidelines on CCP recovery plan scenarios (Article 9(12) CCPRRR) (Jul. 2021), available at [Link](#).

⁷ ESMA, Consultation Paper, Draft RTS further specifying the factors that shall be considered by the competent authority and the supervisory college when assessing the CCP recovery plan (Article 10(12) CCPRRR) (Jul. 2021), available at [Link](#).

II. CCP12 Responses to Specific Questions to ESMA’s Consultation Paper on Draft RTS on the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources (Article 9(15) of CCPRRR)

Question 1: Do you agree with the proposed approach to define the basic elements of the methodology for the calculation and maintenance of the additional amount of pre-funded dedicated own resources? If not, please explain why and how you would suggest changing the basic elements of the formula?

Notwithstanding that the second tranche of pre-funded dedicated own resources or skin-in-the-game (“SITG”) is provided for in the CCPRRR, CCP12 believes that a CCP’s current SITG is appropriately designed to align incentives between the CCP, and its members and we don’t believe that additional exposure of a CCP’s equity in either the recovery or resolution phases are justified. CCP12 firmly believes that recovery/resolution already incentivizes CCPs to be fully engaged in doing what is needed to keep operating the business soundly and in the most efficient manner. These incentives already include putting CCP financial resources at stake in the form of SITG, or other features appropriate to the particular market and jurisdiction.

As CCPs already contribute sufficient resources, we would like to echo the remarks from FSB’s discussion paper on *Financial resources to support CCP resolution and the treatment of CCP equity in resolution*⁸ that, “SITG is not calibrated with a view to constituting a significant amount of loss absorbing resources. Rather, SITG is calibrated to provide confidence in the risk management incentives of the CCP,” which is consistent with CCP12’s view that CCPs are inherently incentivized to employ prudent risk management standards, with or without SITG.

CCP SITG size currently balances the goal of aligning CCP and clearing member interests and ensures proper incentives for clearing members to manage the risks they bring to the CCP, as well as participate in the default management process. As such, the amount of funding required from the clearing members is based on the risk they bring to the CCP. Likewise, the amount of funding from CCPs considers their market risk neutral position, meaning their contributions serve a different purpose than the contributions of clearing members. CCP SITG must be fit for purpose and neither CCPs nor international standards contemplate it being a significant loss absorbing resource. Therefore, the size of CCP SITG should not undermine the incentives for market participants to manage the risk they bring to the CCP. If CCP SITG is overly large, it will subsidize the risk taking of market participants, creating moral hazard concerns, and distorting the fundamental structure of the CCP clearing model. This will weaken market participants’ incentives to participate in the default management process, as they will consider CCP SITG and the potential for their own mutualization when constructing bids in a default management auction. Further, it risks having negative impacts on business-as-usual risk management as clearing members are not required to contribute capital for the risks they are managing on behalf of their clients.

⁸ FSB, Discussion paper (Nov 2018), available at [Link](#)

While current CCP SITG is appropriate, to the extent any additional resources are required with respect to a second SITG, the methodology for calculation and maintenance should, first and foremost, prioritize: i) preserving the incentives that characterize the central clearing model for participants to effectively manage their risks; and ii) recognizing the role of a CCP as a risk manager that maintains a market risk neutral position on a day-over-day basis. As such, any second SITG should take into consideration existing items like regulatory capital and recognize the prudent nature of a CCP's risk mitigating practices. CCP12 recommends that, if the introduction of a second SITG cannot be avoided, it should be determined based on a holistic review of a CCP's risk tools and practices relative to these aforementioned priorities.

There is no "one-size-fits-all" approach to CCP SITG, and it appears that the highly prescriptive parameters, as well as their weightings, proposed by ESMA for determining a CCP's second SITG may inadvertently create such a regime. It is also unclear how these parameters would be relevant to sizing SITG, as they do not result in a holistic evaluation of a CCP's risk management tools and practices. Notwithstanding that CCPs, as risk managers, are inherently incentivized to manage their risks effectively and appropriately, the following parameters for sizing SITG appear particularly inappropriate:

- The parameters relating to the nature and complexity of asset classes, such as requiring higher SITG for clearing products across multiple asset classes or currencies, fail to recognize that a CCP's local regulator has provided them the authorization to clear such products. Such authorization requires that the CCP demonstrate that it has the sufficient risk management expertise and resources to successfully risk manage such products, with specific focus the expertise necessary to clear products that are new and/or in different asset classes and/or denominated in different currencies.
- The parameters relating to relationships and interdependencies, such as requiring higher SITG for having relationships with multiple payment systems and settlement systems and clearing members outside of the EU, fail to recognize the benefits of facing a diverse set of counterparties, particularly from a geographical perspective. CCPs that face multiple counterparties, particularly where such counterparties (e.g., clearing members) are domiciled across multiple jurisdictions, face less concentrated risk, since, for example, events that may impact counterparties domiciled in one jurisdiction, may not have the same implications for counterparties in another jurisdiction or may not impact them at all. This geographic diversity may be particularly beneficial in managing a stress event. To the extent ESMA believes it must adopt a parameter relating to relationships and interdependencies pursuant to the CCPRRR legislation, it would be more appropriate for the parameter to positively recognize the benefits of counterparty diversity.
- The parameters relating to ownership structure and capital, such as requiring higher SITG for not having a contractual financial commitment from a CCP's parent, fail to recognize the benefits of maintaining capital at the CCP. In particular, a CCP that maintains more capital at the CCP legal entity, compared to a CCP that maintains less capital at the CCP legal entity with a financial commitment from its parent, would be subject to a higher SITG requirement. This construct inappropriately creates a disincentive for a CCP to maintain capital at the CCP legal entity and

punishes them for doing so by virtue of requiring higher SITG. For example, a CCP may dividend out its capital and obtain a parent guarantee, to avoid a higher SITG requirement. To the extent ESMA believes it must adopt a parameter relating to capital pursuant to the CCPRRR legislation, the parameter should reward, rather than punish, CCPs for holding capital at the CCP legal entity.

- The parameters relating to remuneration of senior management, such as having claw back clauses for default or non-default events, fail to recognize the inherent incentives a CCP's senior management has to manage risk, as was highlighted in a recent paper ("McPartland Paper"), which concluded that no SITG is necessary, since "senior CCP executives at major global CCPs are clearly and sufficiently motivated by the incentive compensation programs of their employers."⁹ Notwithstanding this, the proposed parameters fail to recognize differing approaches to remuneration, which in part can be driven by a CCP's ownership and governance structure. Claw backs are only one means by which a CCP's senior management is further incentivized to effectively manage a default or non-default event, as recognized in the McPartland Paper, which also highlighted how senior management that is compensated via stock equity is directly impacted in a default event.¹⁰ The significant decline in equity value associated with a mutualization or other risk event has similar impact to that of claw back clauses. To the extent ESMA believes it must adopt a parameter relating to senior management remuneration pursuant to the CCPRRR legislation, the parameter should recognize the multiple mechanisms through which CCP management compensation can be impacted and focus on alignment of incentives regarding default management and recovery between members, management, and the board for each step of the recovery and resolution process. The importance of providing a continuity of services should be acknowledged as well.

Moreover, the need for a second SITG is also negated by the fact that CCPs are inherently incentivized to effectively manage the risks in their markets, since their offering is dependent on the safety and soundness of their risk management practices, thus CCPs have comprehensive practices for addressing the risks that may arise relating to the areas covered in the proposed parameters. As demonstrated, in part, by the above-noted examples, it is not only inappropriate, but duplicative, to require SITG from a CCP on the basis of these parameters. It is actually, potentially detrimental to a CCP's resiliency, since, as noted above, inappropriately sizing a CCP's SITG can undermine the incentives market participants have to effectively manage their risks, as well as actively participate in the default management process. Simplistically, the parameters proposed by ESMA for determining second SITG fail to consider that a CCP's core role is as a risk manager.

⁹ John McPartland, Challenging Skin in the Game, WFE Focus (Apr. 2021), available at [Link](#)

¹⁰ *Id.*

Question 2: Do you agree with the schematic formula combining a set of parameters assessed by the CCP? If not, please explain why and how you would suggest changing the formula?

Please see our response to Question 1.

Question 3: Do you agree with the list of parameters to describe the structure and the internal organization of CCPs and the nature, scope, and complexity of a CCP's business? If yes, are there additional parameters that should be added to the list? If not, please explain why and how you would suggest assessing the internal organization of CCPs and the nature, scope, and complexity of a CCP's business in the methodology?

Please see our response to Question 1.

Question 4: Do you agree with the list of parameters to describe the structure of incentives of a CCP's shareholders, management, clearing members and clients? If yes, are there additional parameters that should be added to the list? If not, please explain why and how you would suggest assessing the incentives in the methodology?

Please see our response to Question 1.

Question 5: Do you agree with the proposal that all EU CCPs may rely on alternative investments for the purpose of maintaining the SSITG?

Please see our response to Question 1.

Question 6: Do you agree that this list of alternative investments shall be specified in the draft RTS?

Please see our response to Question 1.

Question 7: Do you agree with the proposed list of additional investments for the purpose of maintaining the additional amount of pre-funded dedicated own resources under Article 9(14) of RRR? If not, please explain why? If yes, is there any type of asset that you would like to add to or remove from the list?

Please see our response to Question 1.

Question 8: Do you agree with the proposed procedure for triggering specified recovery measures where all or part of the CCP's pre-funded dedicated own resources allocated to cover SSITG are not readily available for CCPs? If not, please explain why?

Please see our response to Question 1.

Question 9: Do you agree with ESMA's proposed procedure for the compensation of non-defaulting clearing members? If not, please explain why?

No comment.

Question 10: Do you have access to different data and analysis that would contradict ESMA's conclusion that no further adjustment of the SSITG level based on competitiveness consideration is needed?

Please see our response to Question 1.

Question 11: Do you have any additional data that you may share in order to assess the impact of this requirement on the EU CCPs' competitiveness?

Please see our response to Question 1.

Question 12: Do you identify other benefits and costs not mentioned above associated to the proposed approach under each specified aspect of the methodology?

As outlined in our response to Question 1 above, CCP12 would like to emphasize again that an overly large SITG, including a second SITG, ultimately undermines the incentives for market participants to actively manage their risks, as well as actively participate in the default management process, since their resources may not reasonably be at risk. This should be clearly considered and recognized in any cost-benefit analysis.

Question 13: If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.

No comment.

III. CCP12 Responses to Specific Questions to ESMA's Consultation Paper on Draft RTS specifying the conditions for recompense (Article 20(2) of CCPRRR)

Question 1: Do you agree with the proposed order of payments for the recompense to non-defaulting clearing members, i.e., where a contribution made closer to the non-default event would qualify as a senior ranking contribution and result in a senior ranking claim?

With regard to compensation provided pursuant to Article 20(2) of CCPRRR, whereby a CCP in recovery caused by a non-default event has exceptionally and in mutual agreement of members or as a result of their volunteering for measures to reduce the value of possible gains payable by the CCP to non-defaulting clearing members, CCP12 agrees with the proposed order of payments for the recompense to non-defaulting clearing members, i.e. where a contribution made closer to the non-default event would qualify as a senior ranking contribution and result in a senior ranking claim.

Question 2: If you agree with establishing an order of senior payments for the recompense, please consider the following questions.

a) How long should the “senior period” run for, 1 day/1 week and should this period depend on if there is a sequence of non-default events? Should even more layers of priority be introduced?

CCP12 believes that the “senior period” should not be prescribed as it will be event specific. In the alternative, CCP12 believes that a set of considerations should be developed that would indicate factors that would be considered for establishing the “senior period”.

b) Should senior ranking claims be recompensated in full before other qualifying claims are recompensated? If not, should any other balance between senior and other claims be introduced? If yes, how should it work and why would this be preferable to the proposed priority?

CCP12 agrees that the senior ranking claims should be recompensated in full before other qualifying claims are recompensated.

c) Do you agree that recompense shall be proportionate to the losses between equally ranking claims and that senior ranking claims shall have the same split between cash and instruments as other qualifying claims for recompense (i.e., not only cash to senior ranking claims and instruments of ownership to other qualifying claims)?

CCP12 agrees that recompense shall be proportionate to the losses between equally ranking claims and that senior ranking claims shall have the same split between cash and instruments as other qualifying claims for recompense.

Question 3: If you do not agree with establishing an order of senior payments for the recompense as described in this paper, please explain why? How should a different order of recompense be structured? Should all qualifying recompense claims be treated pari passu?

Not applicable.

Question 4: Do you agree with the proposed definition of profit for the purpose of the recompense scheme?

CCP12 agrees with the proposed definition of profit for the purpose of the recompense scheme.

Question 5: Do you agree with the proposed values for the maximum share of profits and maximum number of years for the recompense to be paid? If not, please explain why.

Requiring an excessively high percentage of CCP profits as compensation would most likely threaten the commercial viability of the CCP, taking away resources that should be dedicated to the ongoing risk management and innovation. CCP12 therefore suggests that compensation should be limited both in terms of number of years and in terms of maximum amount of profits to recompense the non-defaulting clearing members.

Question 6: If you prefer a different set of numbers for the maximum share of profits or maximum number of years, please explain why you prefer those levels.

CCP12 prefers Option 3 as outlined in the cost-benefit analysis. We suggest the following wording: “setting the maximum number of years to a very short period e.g., 3 years and the maximum share of the CCP’s annual profits that could be used for the recompense payments to an also very low, e.g., 20-30%, leaving a fairly wide scope for distribution of profits”. This would satisfy the regulatory requirement and at the same time would not limit the CCP’s resources. Alternatively, we could suggest 5 years as a middle ground with on a percentage of profits that is less than ESMA’s 70% suggestion.

Question 7: For the purpose of setting an order of payment, 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)?

No comment.

Question 8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

No comment.

Question 9: For the purpose of setting the maximum number of years and maximum share of profits, 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)?

As outlined in Question 5 and Question 6 above, CCP12 disagrees with the proposed Option 2 and advocates for Option 3 with the suggested wording: “setting the maximum number of years to a very short period e.g., 3 years and the maximum share of the CCP’s annual profits that could be used for the recompense payments to an also very low, e.g., 20-30%, leaving a fairly wide scope for distribution of profits”.

Question 10: If you prefer a different approach, how would it impact this section on the cost and benefit assessment? Please provide details.

Not applicable.

IV. CCP12 Responses to Specific Questions to ESMA’s Consultation Paper on 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

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.

While CCP12 recognizes that the indicators proposed by ESMA are ones that a CCP should surely monitor, we believe that such indicators are not necessarily indicative of a significant non-default event, as explained further below with respect to the Guidelines proposed. For a non-default event to be significant and consequently to potentially require the application of temporary restrictions, the event should, or be highly likely to, result in an outcome that could have a severe adverse effect on the financial stability in the EU. If this is not met, then the CCP should have the opportunity to address the event as it deems appropriate, pursuant to its rules and recovery plan, if applicable. This should be made clear in any Guidelines adopted by ESMA.

For example, the following Guidelines are not indicative of significant non-default events:

- While CCP12 believes the intention of ESMA, regarding Guideline 1, was to capture events relating to a capital deterioration that would (or likely will) substantially deplete all of the CCP’s capital and there is no likely prospect to avoid this, the triggers proposed do not clearly achieve this. By way of example, under Guideline 1(b), “a significant capital deterioration” of the CCP’s buffer could trigger temporary restrictions even if it does not hit the notification threshold and while ESMA uses the word “significant” by no means is such an event significant, as demonstrated by the maintenance of capital above the buffer amount. Even if a CCP losses are well within buffers and within annual projections, a significant deterioration might not breach the CCP’s regulatory capital. In such cases, temporary restrictions should not apply. Recognizing that ESMA must adopt Guidelines in this area, CCP12 suggests altogether deleting 1(b) and keeping 1(a) as guidance, but also making clear that events that trigger the use of restrictions are dependent on the occurrence of events that would (or likely will) substantially deplete all of the CCP’s capital and there is no likely prospect to avoid this.
- While CCP12 believes the intention of ESMA, with regard to Guideline 2, was to capture events that would leave the CCP unable to provide its critical clearing services in a safe and sound manner (i.e., its viability clearly is in question), the triggers proposed do not clearly do this. By way of example, under Guideline 2, the failure of a critical third-party entity preventing the CCP from operating its full clearing service, should not be an indicator kicking off Article 45(a) restrictions as the CCP has no control over a third-party entity. Third-party providers are chosen based on extensive due diligence reviews which cover all possible operational risk and compliance issues before the final decision is made. Their operational capabilities under extraordinary market conditions can be assessed to a certain extent and those institutions are also regulated entities. Therefore, CCPs only have limited control and supervision of our third-

party providers. Additionally, regarding the potential loss of clearing volumes or clearing members, a reduction of volumes or number of clearing memberships is not directly related to the CCP's business activities or its ability to perform at the required level.

Regarding both events described above, they are not necessarily indicative of any shortcomings in risk management or that the CCP can no longer provide its critical clearing services in a safe and sound manner. Therefore, recognizing that ESMA must adopt Guidelines in this area, CCP12 would suggest retaining the first paragraph (i.e. material operational event with significant medium term financial impact) and removing the second and third sub paragraphs (i.e. third-party event and the drop in volumes), but also making clear that events that trigger the use of restrictions are dependent on the occurrence of events that would leave the CCP unable to provide its critical clearing services in a safe and sound manner (i.e., its viability is clearly in question).

Notwithstanding the above, for avoidance of doubt, CCP12 notes that the triggers for the use of temporary restrictions should be dependent on an event having, or likely having, a severe adverse effect on the financial stability of the EU.

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

No comment.

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)?

No comment.

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

No comment.

V. **CCP12 Responses to Specific Questions to ESMA's Consultation Paper on Draft Guidelines on the consistent application of the triggers for the use of Early Intervention Measures (Article 18(8) CCPRRR)**

Question 1: Do you have any general comments on the draft Guidelines on triggers for the use of early intervention measures?

CCP12 understands that under CCPRRR the competent authority has the authority to implement early interventions measures before the arrangements and tools set forth in a CCP's rulebook are fully exhausted under three scenarios (i.e., infringement or potential infringement of capital and prudential requirements, risk to financial stability in the Union or one or more Member States, and a crisis situation threatens operations, such as the CCP's ability to provide clearing services).

CCP12 however generally disagrees with the triggers proposed, as we believe they are far too prescriptive and fail to focus on identifying triggers that result in an outcome that would (or will likely) have a severe adverse effect on financial stability in the EU. While the Guidelines refer to financial stability in some instances the considerations themselves do not necessarily warrant circumstances that could lead to an adverse effect on stability, particularly when looking at each consideration/trigger independently, nor do the triggers necessarily identify events that would leave the CCP unable to provide its critical clearing services in a safe and sound manner (i.e., its viability is clearly in question). Generally, it seems that any infringement or even potential infringement of a CCP's prudential requirements could lead to early intervention. This is highly inappropriate, since early intervention should always be a last resort because, as explained further below, it can undermine the incentives that characterize the central clearing model and creates uncertainty as to how the CCP's rulebook will operate. Ultimately, these outcomes could undermine financial stability by preemptively pushing the CCP into resolution.

Given these potential negative outcomes, CCP12 is highly concerned by the prospect of a competent authority intervening before the CCP has had the opportunity to fully exhaust the arrangements and tools provided for under its rulebook. CCPs have worked with clearing members, regulators, and market participants to develop these arrangements and tools, which are embedded in CCPs' rulebooks to help balance incentives and inform market participants' expectations during a CCP recovery. They have been carefully calibrated to address stress events and appropriately incentivize the active participation of market participants in the default management and recovery process. Accordingly, the CCPs' rulebooks provide not only the proper balance of incentives for all participants, but also as much certainty as is possible during periods of stress. CCP12 strongly encourages competent authorities, to the maximum extent possible, to defer to the recovery arrangements and tools set forth in a CCP's rulebook and recovery plan to ensure a CCP recovery proceeds as market participants expect.

With respect to the triggers, CCP12 supports ESMA's statement that the triggers set forth in the Guidelines do not oblige competent authorities to automatically apply early interventions measures. These should be applied only in the most severe of situations. Even where these triggers do apply, the facts and circumstances regarding the need for early intervention should be carefully considered and a

level of flexibility should be provided to the CCP such that it may carry out the provisions of its recovery plan as designed. Therefore, CCP12 would encourage ESMA to clarify that the measures taken under the Guidelines always need to be suitable, necessary, and proportionate to the observed situation. Generally, CCP12 would recommend that each of the following criteria must be met for early intervention to occur and thus, such criteria should be reflected in any Guidelines:

- The CCP's viability is clearly in question, such that it is likely unable to provide its critical clearing services in a safe and sound manner;
- There is, or highly likely to be, serious adverse effects on financial stability in the EU; and
- No actions taken by the CCP would address the circumstances at hand and alternatively, there is no viable private sector alternative.

Question 2: Do you agree with the proposal on procedures as set out in Guideline 1? If not, please elaborate.

CCP12 generally disagrees with the proposal on procedures as set out in Guideline 1. Notwithstanding CCP's concerns with the triggers proposed in the Guidelines, as described in this response, given that the range of triggers for early intervention as outlined in the Guidelines cover numerous events, we would like to highlight those competent authorities should ensure that the measures chosen for early intervention are proportional to the severity of the deficiency observed at the CCP. Therefore, we believe that observed deficiencies that should be considered for early intervention should be material and that the CCP is not able to address them by itself, including through a private sector alternative, in a timely manner. Furthermore, the procedures should ensure that there is an evaluation by competent authorities that early intervention is necessary to avoid adverse effects on financial stability in the EU.

Question 3: 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.

While CCP12 appreciates the focus on financial stability in Guideline 2, we generally disagree with the proposal. In assessing if financial stability risk is presented to the EU, competent authorities must consider the unique facts and circumstances surrounding the event, which the parameters proposed do not make clear would occur. While some of the parameters proposed may be relevant for a specific event, they are not universally applicable.

Question 4: Do you agree with the proposed Guideline 3 and in particular the proposed indicators to assess capital requirements? If not, please elaborate.

Given the negative outcomes of early intervention highlighted in CCP12's response to Question 1, CCP12 generally disagrees with the proposed Guideline 3. In particular, the ability for competent authorities to enact early intervention measures where the CCP is "likely to infringe in the near future" its capital requirements could lead to an inappropriately early intervention by authorities. Even if CCP losses are well within buffers and within annual projections (i.e., the CCP has not breached its regulatory capital

requirement), this could be deemed by authorities as a *likely* infringement and inappropriately lead to intervention. In addition to CCP12's recommendation in its response to Question 1, to the extent ESMA believes it must adopt Guidelines relating specifically to capital requirements, any trigger should make clear that events that trigger the use early intervention measures are dependent on the occurrence of events that would (or likely will) substantially deplete all of the CCP's capital and there is no likely prospect to avoid this outcome.

Question 5: Do you agree with the proposed Guideline 4 and in particular the proposed indicators to assess EMIR prudential requirements? If not, please elaborate.

Given the negative outcomes of early intervention highlighted in CCP12's response to Question 1, CCP12 generally disagrees with the proposed Guideline 4. In particular, the ability for competent authorities to enact early intervention measures where the CCP does, or is *likely* to, infringe one of its prudential requirements overlaps with the supervisory duties of CCPs' national competent authorities under EMIR. In general, an EMIR infringement alone should not automatically trigger early intervention, as such infringement (or even likely infringement) is not inherently indicative that adverse effects on financial stability in the EU are likely to occur, and as such infringement – particularly in the case of only just a *likely* infringement – does not mean that a CCP is unable to provide its critical clearing services in a safe and sound manner. In fact, intervening based on the indicators proposed in Guideline 4 alone, without giving the CCP the opportunity to promptly remediate the matter, runs counter to the objectives of supporting financial stability, as it likely will lead to lack of confidence in the CCP.

The approach under Guideline 4 described, whereby the national competent authority ("NCA") would be looking at Key Risk Indicators ("KRIs"), overlaps with NCAs supervisory duties under EMIR. A single breach in an NCAs risk capital assessment, as well as other items identified in the proposed Guideline 4, does not by itself justify a possible early intervention. There are already processes and procedures under EMIR in place to address such non-recurring incidents and therefore, we do not believe that an EMIR prudential assessment would be required for an NCA to assess whether there is a need for an early intervention.

In addition to its recommendation in its response to Question 1, to extent ESMA believes it must adopt Guidelines relating specifically to EMIR prudential requirements, this trigger in particular should make clear that events that trigger the use early intervention measures are dependent on the occurrence of events that would leave the CCP unable to provide its critical clearing services in a safe and sound manner (i.e., its viability is clearly in question) and that the CCP itself, including through a private sector alternative, cannot address such events.

Question 6: 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.

Given the negative outcomes of early intervention highlighted in CCP12's response to Question 1, CCP12 generally disagrees with the proposed Guidelines 5 to 9. As such, CCP12 would refer ESMA to its recommendation in its response to Question 1. Moreover, in line with CCP12 observations with the proposed Guidelines 3 and 4, it seems that the proposed Guidelines 5 to 9 capture events that a CCP could address independently without the need for early intervention measures.

Notwithstanding the above, to extent ESMA believes it must adopt Guidelines specifically in these areas, CCP12 would like to provide some targeted comments:

- Regarding Lit. a of Guideline 5, we would like to caution against choosing a wording that would leave room for interpretation and would encourage ESMA to clarify that an identified concern should in any case be material to trigger early intervention. More broadly, regarding Guideline 5, CCP12 would refer ESMA to its response to Question 5.
- Regarding Lit. a, c, d of Guideline 6 (plus Lit. d of Guideline 8), we would like to highlight that these relate to the financial situations of clearing members, over which a CCP has no control. It is not and should not be the responsibility of a CCP to control a clearing member's ability to meet the requirements arising from that clearing member's relationship with the CCP as agreed in the rulebook. CCP12 would therefore ask for a clarification of these indicators, tying them to aspects that are within the direct responsibility of the CCP.
- Regarding Guideline 9, CCP12 would again ask that it be clarified that a focus should be on situations which present an adverse effect on the financial stability, notably a quantification as the current wording around "material amount of default" or "significant issues in the functioning of a market" leaves room for interpretation.

Question 7: 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)?

CCP12 disagrees with the conclusion of ESMA and the proposed approach (Option 2). Recognizing that ESMA must adopt guidelines pursuant to CCPRRR, CCP12 believes, that Option 1 is the better option out of the options proposed, since it would provide for a clear determination as to whether an early intervention needs to be assessed based on avoiding adverse effects on financial stability in the EU, as recommended above. We find that the list of indicators should primarily be developed with the EU and its Member States in mind. We do not believe that such a granular list of indicators would provide the necessary certainty to both NCAs and CCPs and most importantly provide a clear set of circumstances under which the NCA should consider stepping in. We would instead advocate for a smaller set of indicators developed by NCAs that can be easily applied in any given circumstance within their respective

jurisdiction and that focus on identifying where adverse effects on financial stability in the EU have, or are highly likely to, occur.

Question 8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

Not applicable.

VI. CCP12 Responses to Specific Questions to ESMA's Consultation Paper on Draft Guidelines on CCP recovery plan indicators (Article 9(5) CCPRRR)

Question 1: Do you agree with the overarching principle and objectives of the guidelines for the framework of CCP recovery plan indicators as set out in the proposed Guideline 1?

CCP12 disagrees with the framework of CCP recovery plan indicators as set out in the proposed Guideline 1 and would caution against taking a too prescriptive approach by requiring too detailed and too many indicators to be included in all CCP recovery plans, irrespective of the risk profile of the CCP as set by Art. 9(3) of the CCPRRR.

CCP12 supports however ESMA's view, that recovery plans vary depending on various conditions and that a one-size-fits-all approach cannot and shall not be applied. To better provide for the differences among CCPs, CCP12 requests that ESMA consider a less prescriptive approach to these aspects of the recovery plan. For example, CCPs should maintain flexibility to identify relevant recovery plan indicators and determine how such indicators should fit into the design of their recovery plans. This is because, in part, there are various differences among CCPs, including differences in services, products cleared and ownership structure, and CCPs should have the flexibility to determine which indicators are relevant, and should not be required to design their recovery plans to require specified links of each scenario to an indicator or type of indicator.

Consequently, CCP12 would recommend that ESMA adopt Guidelines that have an objective of establishing indicators that have a CCP, based on the unique characteristics of its offering, identify circumstances that could ultimately lead to the CCP's inability to provide its critical clearing services in a safe and sound manner, in the face of both default and non-default events. Identifying circumstances on this basis would allow a CCP to react appropriately in business-as-usual when such circumstances begin to present themselves and to the extent possible, avoid entering into recovery in the first place, but at a minimum mitigating the likelihood that the CCP would be unable to provide its critical clearing services. Furthermore, the focus should also be on defining circumstances that are relevant to identifying potential events that could have an adverse effect on financial stability in the EU. Such an approach would ensure an effective monitoring and assessment of the recovery indicators without adding unnecessary complexity.

Question 2: Do you agree with the proposed Guideline 2 and the categorization of CCP recovery plan indicators into the three categories? Would you propose a different categorization?

CCP12 disagrees with the proposed Guideline 2 and the categorization of CCP recovery plan indicators into the three specified categories. In particular, the granular way in which indicators must be defined yields an unworkable framework that will not allow a CCP to adopt indicators that are suited to the wide range of facts and circumstances that could characterize its distress. For example, with respect to certain types of recovery scenarios, particularly those related to non-default events, it is impossible for a CCP, or any stakeholder, to be able to predict the exact situation and time at which certain events will occur;

for avoidance of doubt, this is not to say that a CCP should not have the necessary arrangements and tools to react to such events accordingly, nor is it to imply that a CCP's resources for managing a clearing member default should be used in any other manner and order than what is established ex ante under the CCPs rulebook.

Please see also our response to Question 1.

Question 3: Do you agree with the proposal to link each recovery plan scenario of a CCP with at least one 'indicator that provides early warning for recovery actions' and one 'indicator that signals the move from Business-as-Usual risk management to the recovery phase'? Would you propose a higher number of indicators for each scenario?

CCP12 disagrees with the proposal to link each recovery plan scenario of a CCP with at least one 'indicator that provides early warning for recovery actions' and one 'indicator that signals the move from Business-as-Usual risk management to the recovery phase'. CCP12 believes that the Guidelines should leave some flexibility to CCPs to identify the most appropriate indicators based on their specific risk profiles, while focusing on identifying circumstances that could ultimately lead to the inability to provide their critical clearing services (i.e., a recovery event).

Question 4: Do you agree with the list of proposed indicators for each type of scenario as set out in Table 1? Would you add/delete any?

Please see our response to Questions 1 and 2. Regarding Table 1, CCP12 would recommend that Table 1 should not be adopted and instead ESMA should take a more principles-based approach, whereby the proposed Guideline 3 has a CCP identify indicators relating to the types of default and non-default events that are relevant to their offering. However, to the extent this approach is not taken, at a minimum, Table 1 should be referenced as providing examples and as such, a CCP should not have to calibrate indicators using every consideration enumerated.

Question 5: Do you agree with the degree of granularity of the proposed indicators (as set out in Table 1) or should these be more prescriptive? Example: to assess the reduced liquidity of a market and the increased likelihood of being unable to reach a balanced book, the indicators could be the withdrawal of one or several market participants, the trading volumes, and the typical transaction costs.

Please see our response to Question 4, particularly as it related to its recommendations for Table 1.

Question 6: Do you agree with the proposed approach for the 'indicators that signal the usage of specific recovery measures'?

Please see our responses to Questions 1 and 2.

Question 7: Do you agree with the proposed Guideline 4 on the integration of CCP recovery plan indicators with the CCP's monitoring system, and with the list of risks, entities and issues that should be monitored?

CCP12 generally agrees with the proposed Guideline 4 as CCPs should in principle monitor relevant risks in accordance with Art. 9(4 and 5) of the CCPRRR. However, we would caution against creating overlaps and duplications where relevant risks are already monitored and reported through existing procedures. CCP12 notes many are covered by the requirements that already exist under EMIR. Therefore, we would encourage ESMA not to require the monitoring of anything that would go beyond the recovery plan indicators themselves. We would also welcome clarification from ESMA as to how some of the factors should be monitored in practice.

Question 8: Do you agree with the proposed Guideline 5?

CCP12 agrees with the proposed Guideline 5.

Question 9: Do you agree with the Option 3, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 3)?

No comment.

Question 10: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

Not applicable.

VII. CCP12 Responses to Specific Questions to ESMA's Consultation Paper on Draft Guidelines on CCP recovery plan scenarios (Article 9(12) CCPRRR)**Question 1: Do you agree that each CCP should include, in its recovery plan, at least one scenario for each of the seven types of scenarios?**

While CCP12 believes that ESMA has generally identified the types and sources of risks to which a CCP could be exposed to, particularly as it relates to default losses (e.g., financial losses that exceed pre-funded default fund resources and liquidity shortfall that exceeds liquidity resources), we would caution against taking a too prescriptive approach and requiring CCPs to include, in its recovery plan, at least one scenario for each of the seven types of scenarios that ESMA has identified for default, non-default and combination event scenarios. These scenarios may overlap and are not mutually exclusive with respect to the risk a CCP faces and how it should be managed. We would therefore encourage ESMA to ensure some flexibility for CCPs to adopt a smaller subset of default, non-default, and combination event scenarios that are most meaningful to their risk profile. Consequently, CCP12 would recommend that Table 1 should not be adopted and instead ESMA should take a more principles-based approach, whereby the proposed Guideline 1 (as well as the proposed Guideline 2) has a CCP identify scenarios relating to the types of default and non-default events that are relevant to their offering. However, to the extent this approach is not taken, at a minimum, Table 1 should be referenced as providing examples and as such, a CCP should not have to adopt scenarios using every consideration enumerated.

Moreover, a less prescriptive approach would yield the adoption of scenarios that account for the unique characteristics of each CCP's service offering. There are various differences among CCPs, including differences in services, products cleared and ownership structure, among other areas. Given this, the risks that each CCP faces inherently differs and thus, a risk to one CCP could constitute a recovery scenario, might not be a recovery scenario for another CCP. Along these same lines, in designing its recovery scenarios, a CCP must be able to account for its business-as-usual risk management practices that in many cases, particularly for non-default losses, significantly mitigating the likelihood of a non-default event triggering a CCP's recovery. Where this occurs, a CCP should not be required to arbitrarily include a recovery scenario relating to such related risk in its recovery plan, which could be the outcome under the proposed Guidelines, given their prescriptive nature.

Additionally, while we believe this is the objective of ESMA, given what is established under the CCPRRR legislation, for purposes of clarity and certainty, CCP12 would recommend that ESMA adopts Guidelines that make it clear that the objective of a CCP when adopting scenarios for its recovery plan is to adopt scenarios that are characterized by events, based on the unique characteristics of its offering, that could ultimately undermine its ability to provide its critical clearing services in a safe and sound manner, in the face of both default and non-default events. We believe this is particularly relevant in the case of non-default event scenarios, since default event scenarios are likely to have more clear indicators (e.g., financial losses that exceed pre-funded default fund resources). Additionally, identifying circumstances on this basis ensures that the scenarios are sufficiently severe, particularly in the case of non-default events, and are relevant to the CCP's offering. Furthermore, the focus should also be on defining

scenarios that are relevant to identifying potential events that could have an adverse effect on financial stability in the EU.

Question 2: Do you agree with the proposed list of the types of scenarios? Would you propose any additional types of scenarios?

Please see our response to Question 1. For avoidance of doubt, CCP12 would also not propose any additional types of scenarios.

Question 3: Do you agree that CCPs should further assess, based on the factors provided, whether it is necessary to create additional scenarios for each type of scenario?

Where a CCP is of the opinion that any additional types of scenarios would be necessary, it should have the flexibility to include them on a voluntary and case-by-case basis, based on the risk profile and specificities of the CCP in question.

Question 4: Do you agree with the proposed Guideline 2 and the list of relevant types and sources of risk that CCPs should cover when building their range of recovery plans scenarios?

Please see our response to Question 1.

Question 5: Do you agree with the proposed Guideline 3 and the principles for determining the magnitude of the recovery plan scenarios (with reference to the overall risk management framework of the CCP as required by EMIR and the relevant RTSs)?

CCP12 in general agrees with Guideline 3.

Question 6: As regards operational risk, do you agree the recovery plan scenarios should include, if deemed relevant, scenarios in which all resiliency measures that form part of the policies and procedures required by Article 34 of EMIR are surpassed, leading to a failure in one or more critical functions of the CCP that exceed the legal requirement set out in article 17(6) of RTS 153/2013?

CCP12 agrees in general with this approach.

Question 7: Do you agree with the proposed Guideline 4 and the information to be included when describing the recovery plan scenarios?

CCP12 agrees with the proposed Guideline 4 and the information to be included when describing the recovery plan scenarios.

Question 8: Do you agree with the proposed Guideline 5?

CCP12 agrees with the proposed Guideline 5.

Question 9: Do you agree with the Option 3, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 3)?

CCP12 disagrees with ESMA's conclusion and the proposed approach (Option 3). As noted above, CCP12 would like to caution against a too prescriptive approach and would recommend some flexibility for a CCP to assess the risks to be reflected in its recovery plan scenarios based on its risk profile and specificities. Therefore, CCP12 would rather advocate for Option 2 out of the options proposed.

Question 10: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

No comment.

VIII. CCP12 Responses to Specific Questions to ESMA's Consultation Paper on Draft RTS further specifying the factors that shall be considered by the competent authority and the supervisory college when assessing the CCP recovery plan (Article 10(12) CCPRRR)

Question 1: Do you agree with the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (a) of Article 10(3) of CCPRRR?

CCP12 would like to caution against taking a too prescriptive approach and would recommend some flexibility for a CCP to assess the factors to be reflected in its recovery plan based on its risk profile and specificities.

Question 2: Would you add any additional elements and/or delete any? If so, please justify.

CCP12 considers the list of specified elements complete although we would encourage ESMA to ensure that CCPs are able to assess the proposed elements and to specify them where CCPs might not be able to assess them to the full extent.

Question 3: Do you agree with the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (b) of Article 10(3) of CCPRRR?

CCP12 overall agrees with the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (b) of Article 10(3) of CCPRRR, although we would encourage ESMA to ensure that CCPs are able to assess the proposed elements.

Question 4: Would you add any additional elements and/or delete any? If so, please justify.

Please refer to the answer to the previous Question.

Question 5: Do you agree with the proposed list of elements (as further specified in the RTS) to be taken into consideration under point (c) of Article 10(3) of CCPRRR?

CCP12 agrees in general with the list of elements to be taken into consideration.

Question 6: Would you add any additional elements and/or delete any? If so, please justify.

CCP12 considers the list of specified elements complete.

Question 7: Do you agree with the Option 1, if not please explain? Have you identified other benefits and costs not mentioned above associated to the proposed approach (Option 1)?

CCP12 agrees with the cost-benefit analysis provided by ESMA and supports the conclusion of ESMA, that the benefits of issuing these Guidelines outweigh the costs, which results in the preferable choice of

Option 1 - to provide elements further specifying the factors based on the aspects to be covered in the recovery plan, for example reflecting aspects required under Section A, Annex of the CCPRRR. CCP12 has not identified other benefits and costs not mentioned above associated to the proposed approach (Option 1).

Question 8: If you advocated for a different approach, how would it impact the cost and benefit assessment? Please provide details.

Not applicable.

IX. About CCP12

CCP12 is the global association for CCPs, representing 40 members who operate more than 60 individual central counterparties (CCPs) globally across the Americas, EMEA and the Asia-Pacific region.

CCP12 promotes effective, practical, and appropriate risk management and operational standards for CCPs to ensure the safety and efficiency of the financial markets it represents. CCP12 leads and assesses global regulatory and industry initiatives that concern CCPs to form consensus views, while also actively engaging with regulatory agencies and industry constituents through consultation responses, forum discussions and position papers.

For more information please contact the office by e-mail at office@ccp12.org or through our website by visiting ccp12.org.

X. CCP12 Members

